PENGURUS KAWASAN, SELIA SELENGGARA SELATAN SDN BHD & ANOR v. IQMAL IZZUDDEEN MOHD ROSTHY & ORS AND ANOTHER CASE

HIGH COURT MALAYA, SEREMBAN
AZIZUL AZMI ADNAN J
[APPEAL NOS: NA-12B-9-04-2022 & NA-12B-10-04-2022]
25 MAY 2023
[2023] CLJ (JT12)

Abstract – *Section 101 of the Local Government Act 1976 imposes upon local authorities a statutory duty to remove any tree that is likely to cause danger to public safety. Section 101, by its plain words, does not appear to have any exceptions; it applies to 'any road' and 'any public road or street'. Despite this, there must be logical limits placed on the meaning of 'road' in this context. Therefore, the expression 'road' and 'street' must mean those roads and streets coming within the jurisdictional limits of the local authority in question. In this case, the existence of such a duty for Jabatan Kerja Raya, for the maintenance of Federal roads which includes the duty to maintain wayside trees so that they do not pose danger to road users, precludes the possibility that there could exist overlapping duties placed upon local authorities to maintain those same Federal roads.*

TORT: *Negligence – Liability – Tree uprooted and fell on motorcyclist stopping at traffic light – Failure to maintain trees adjacent to road – Whether responsibility for maintenance of wayside trees on Federal roads lie with city council, Jabatan Kerja Raya or concessionaire*

TORT: *Duty of care – Breach of duty – Tree uprooted and fell on motorcyclist stopping at traffic light – Failure to maintain trees adjacent to road – Whether responsibility for maintenance of wayside trees on Federal roads lie with city council, Jabatan Kerja Raya or concessionaire – Whether there was breach of duty*

DAMAGES: *Negligence – Claim for – Tree uprooted and fell on motorcyclist stopping at traffic light – Motorcyclist claimed for damages against city council, Jabatan Kerja Raya, Government of Malaysia and concessionaire – Sessions Court allowed claim and awarded damages to motorcyclist – Whether damages awarded excessive*

One Iqmal Izzuddeen ('plaintiff') was riding his motorcycle and had stopped at a traffic light when, without warning, a nearby tree uprooted and fell on him, causing him to suffer serious injuries and multiple fractures. The plaintiff commenced an action at the Sessions Court, premised upon negligence and breach of statutory duties to maintain the trees adjacent to the

road, and named the Mayor of Seremban City Council, the City Council of Seremban, the Director of Jabatan Kerja Raya ('JKR'), JKR, the Government of Malaysia, the area manager of Selia Selenggara Selatan Sdn Bhd and Selia Selenggara Selatan Sdn Bhd as the first to seventh defendants, respectively. The Sessions Court found the third to seventh defendants liable to the plaintiff and awarded damages amounting to RM216,949. Hence, the present appeals by (i) the sixth and seventh defendants ('Selia Selenggara') against the finding that they were jointly and severally liable with the third to fifth defendants, to the plaintiff; and (ii) the third to fifth defendants against the finding of liability and quantum of damages awarded to the plaintiff. The issues that arose for adjudication were: (i) who shouldered the responsibility of maintaining the wayside trees on Federal roads – the City Council of Seremban or JKR; (ii) was there a breach by JKR of its duty of care; (iii) the liability of Selia Selenggara; and (iv) whether the damages awarded were excessive.

Held (allowing appeal by sixth and seventh defendants; dismissing appeal by third to fifth defendants):

(1) If JKR bears the duty to maintain Federal roads to ensure that they may safely be used by the general public for passage, then it must also necessarily follow that JKR would owe a duty to road users to take reasonable care to ensure that such roads would be free from dangers such as potholes, poorly marked lanes, malfunctioning traffic lights and falling trees. JKR may not be responsible for the beautification of public roads or the maintenance of the aesthetics of the trees that are planted by the roadside, but this does not detract from its duty to take reasonable care to ensure that risks to road users from falling trees are appropriately mitigated. At trial, a complaints log record belonging to JKR was adduced, showing that JKR had assumed responsibility for removing dead and fallen trees from Federal roads. There were also internal minutes of JKR that showed that it had awarded contracts to local companies to undertake trimming of branches of trees located on road shoulders. JKR's own website depicted photographs and reports of its activities relating to the removal of dead trees along the sides of roads and the removal of coconut trees that overhung roads. Therefore, there was sufficient material to conclude that there existed a duty of care owed by JKR to the users of Federal roads, based on the relationship of proximity between it and the road users, as well as the assumption by JKR of the responsibility to maintain such roads so that they are reasonably safe for passage. (paras 17-19)

(2) The trial judge made a finding of fact that there were two operating mechanisms that had caused the tree to fall, namely: (i) the tree was top heavy due to its large size, long branches and lush foliage; and (ii) the trunk of the tree was in a poor condition. There was nothing in the

record of appeal to cause the court to overturn the above finding of fact. Had proper monitoring and maintenance of the tree been undertaken by JKR, the plaintiff would not have suffered his injuries. JKR had not led any evidence to the effect that the precarious position of the tree could not have been uncovered even if they had undertaken the proper inspection. (paras 23 & 24)

(3) Selia Selenggara had been awarded, by the Government of Malaysia, a concession to undertake maintenance of Federal roads in the southern region of the Peninsula. The terms of the concession agreement specifically excluded landscaping works from the scope of routine maintenance works to be undertaken by Selia Selenggara. It was thus clear that, at the time of the accident, Selia Selenggara was not charged with the responsibility to undertake routine maintenance works relating to the monitoring of the condition of wayside trees and the pruning of such trees. (paras 26 & 28)

(4) All the awards granted by the trial judge were well within the range suggested by the Revised Compendium of Personal Injury Awards published by the Malaysian Bar. Not only was there no evidence to suggest that any of the awards of damages were excessive, there was not even any credible submissions advanced as to why this was the case. The appeal against the quantum of general damages ought to be dismissed. (paras 34 & 37)

Case(s) referred to:
Ahmad Jaafar Abdul Latiff v. Dato' Bandar Kuala Lumpur [2014] 9 CLJ 861 FC ***(refd)***
Jamiah Holam v. Koon Yin [1982] 1 LNS 89 HC ***(refd)***

Legislation referred to:
Local Government Act 1976, s. 101(b)

(Appeal No: NA-12B-9-04-2022)
For the appellants - Jaqdesh Singh Johal; M/s Mohana Krishnan
For the 1st respondent - Vimalarani Sothiratnam; M/s V Kathigasu & Co
For the 2nd & 3rd respondents - Aisha Jothilingam & Ganesalingam Vijayaratnam; M/s Ganesalingam Vijyaratnam & Aisha Jothilingam
For the 4th, 5th & 6th respondents - Amalina Zainal Mokhtar; SFC

(Appeal No: NA-12B-10-04-2022)
For the appellants - Amalina Zainal Mokhtar; SFC
For the 1st respondent - Vimalarani Sothiratnam; M/s V Kathigasu & Co
For the 2nd & 3rd respondents - Aisha Jothilingam & Ganesalingam Vijayaratnam; M/s Ganesalingam Vijyaratnam & Aisha Jothilingam
For the 4th & 5th respondents - Jaqdesh Singh Johal; M/s Mohana Krishnan

[Editor's note: Appeal from Sessions Court; Case No: NA-A51KJ-6-12-2018]

Reported by Najib Tamby

A

JUDGMENT

Azizul Azmi Adnan J:

Introduction

B **[1]** The plaintiff in this case, En Iqmal Izzuddeen bin Mohd Rosthy was riding his motorcycle on Jalan Rasah on 1 May 2018. He stopped at a traffic light near the junction to the Rasah toll on the North-South Expressway. Without warning, a nearby tree uprooted and fell on the plaintiff. He suffered serious injuries, including multiple fractures to his arms, ribs and jaw. He was just 18 years old at the time of the accident.

C **[2]** The plaintiff sued the defendants in the court below for negligence and breach of statutory duties for their contended failure to (among others) maintain the trees adjacent to the road.

[3] The first and second defendants at the Sessions Court were the Mayor D and the City Council of Seremban respectively. The third and fourth defendants were the directors of the Public Works Department (Jabatan Kerja Raya or JKR) and the department itself. The fifth defendant was the Government of Malaysia, whom the plaintiff sought to make liable on the principle of vicarious liability. The seventh defendant was a company known as Selia Selenggara Selatan Sdn Bhd, a company that has been awarded by E the Government of Malaysia with a concession to undertake maintenance of Federal roads in the southern region of the Peninsula. The sixth defendant was its area manager.

[4] After a trial of the action, the Sessions Court found the third to seventh F defendants liable to the plaintiff, and awarded damages amounting to RM216,949.

[5] The sixth and seventh defendants appealed against the finding that they were jointly and severally liable with the third to fifth defendants to the plaintiff.

G **[6]** The third to fifth defendants also appealed against the finding of liability, as well as on the quantum of damages that was awarded to the plaintiffs.

[7] These appeals were heard together. I allow the sixth and seventh H defendants' appeal and dismiss the third to fifth defendants' appeal. The reasons are explained below. The parties are referred to in this judgment as they were before the court below.

I

The Liability Of JKR And The Other Government Defendants

[8] The learned Senior Federal Counsel in this case argued that:

(i) JKR bore no responsibility to maintain trees, and that its responsibility was limited to the proper maintenance of Federal roads. Thus, argued counsel, it was only if trees blocked roads or interfered with road-related infrastructure would there arise a duty on JKR to clear the roads; and

(ii) in accordance with s. 101(b) of the Local Government Act 1976, the responsibility for the maintenance of wayside trees lay with the Majlis Perbandaran Seremban (now the Majlis Bandaraya Seremban).

[9] These two points are addressed in reverse order in the following paragraphs.

The Local Government Act 1976

[10] Section 101 of the Local Government Act 1976 provides as follows:

> In addition to any other powers conferred upon it by this Act or by any other written law a local authority shall have power to do all or any of the following things, namely:
>
> ...
>
> (b) to plant, trim or remove trees;
>
> ...
>
> (cc) to require the owner or occupier of any premises to do any of the following acts:
>
> (i) to remove, lower or trim to the satisfaction of the local authority any tree, shrub or hedge overhanging or interfering in any way with the traffic on any road or street or with any wires or works of the local authority or which in the opinion of the local authority is likely to endanger the public safety or convenience and in the event of any tree situated in private premises falling across any public road or street the local authority may remove the fallen tree and the expenses incurred shall be charged on and recoverable from the owner or occupier thereof;
>
> (ii) to remove any dilapidated fence or structure abutting upon any public place and if such owner or occupier fails to comply with any such request any authorised officer of the local authority may enter upon the said premises and carry out such work and the provisions of section 115 shall apply to the expenses incurred thereby;

[11] Now, even though s. 101, by its plain words, purports to confer powers upon local authorities, the Federal Court in *Ahmad Jaafar Abdul Latiff v. Dato' Bandar Kuala Lumpur* [2014] 9 CLJ 861 unanimously held that the effect of s. 101 was to impose upon local authorities a statutory duty to remove any tree that is likely to cause danger to public safety.

[12] Now, it is not in dispute that the road on which the accident had occurred was a Federal road, gazetted pursuant to the Federal Roads Act 1959. The first key question for determination by this court is whether s. 101 places the responsibility for the maintenance of wayside trees on the Majlis Perbandaran Seremban even in circumstances where the road in question is a Federal road.

[13] The plain words of s. 101 does not appear to have any exceptions: it applies to "any road" and "any public road or street". Despite this, in my considered view, there must be logical limits placed on the meaning of "road" in this context. For instance, it cannot be that the expression road would include toll roads or expressways that are operated by toll concessionaires. The responsibility for maintaining these roads and their attendant infrastructure must be placed with the toll concessionaires or persons to whom the responsibility has been delegated.

[14] For this reason, the expression "road" and "street" must mean those roads and streets coming within the jurisdictional limits of the local authority in question.

[15] The vexed question still remains: does the responsibility for the maintenance of wayside trees on Federal roads lie with the Majlis Perbandaran Seremban or with JKR?

The Responsibility Of JKR

[16] None of counsel before me could point to any specific legislation providing for the statutory duty of JKR to maintain Federal roads (let alone the statutory duty to maintain wayside trees on such roads). Before me, Senior Federal Counsel nonetheless concedes that it is the duty of JKR to maintain Federal roads.

[17] In my considered opinion, if JKR bears the duty to maintain Federal roads to ensure that they may safely be used by the general public for passage, then it must also necessarily follow that JKR would owe a duty to road users to take reasonable care to ensure that such roads would be free from dangers such as, potholes, poorly marked lanes, malfunctioning traffic lights, and yes, falling trees. JKR may not be responsible for the beautification of public roads or the maintenance of the aesthetics of the trees that are planted by the roadside, but this does not detract from its duty to take reasonable care to ensure that risks to road users from falling trees are appropriately mitigated.

[18] At trial, a complaints log record belonging to JKR had been adduced, showing that JKR had assumed responsibility for removing dead and fallen trees from Federal roads[1]. There were also internal minutes of JKR that showed that it had awarded contracts to local companies to undertake trimming of branches of trees located on road shoulders[2]. JKR's own website depicted photographs and reports of its activities relating to the removal of dead trees along the sides of roads, and the removal of coconut trees that overhung roads[3].

[19] There was thus sufficient material before the court for me to conclude that there existed a duty of care owed by JKR to the users of Federal roads, based upon the relationship of proximity between it and the road users as well as the assumption by JKR of the responsibility to maintain such roads so that they are reasonably safe for passage.

[20] The existence of such a duty on JKR for the maintenance of Federal roads (which included the duty to maintain wayside trees so that they do not pose danger to road users), in my considered opinion, precluded the possibility that there could exist overlapping duties placed upon local authorities to maintain those same Federal roads. As explained at para. 14 *ante*, the scope of the duties of the local authorities must be limited to those roads coming within each of their jurisdictional limits.

Was There Breach By JKR Of Its Duty Of Care?

[21] Before me, Senior Federal Counsel contended that JKR bore no responsibility to maintain wayside trees on Federal roads. Consistent with this position, JKR had not carried out any monitoring or maintenance of such trees.

[22] This failure, in my considered judgment, established beyond peradventure that JKR had breached its duty of care to the plaintiff.

Causation And Remoteness Of Damage

[23] At paras. 26 and 27 of the grounds of judgment, the trial judge made a finding of fact that there were two operating mechanisms that had caused the tree to fall: the first was the fact that the tree was top heavy, due to its large size, long branches and lush foliage. This fact was supported by the testimony of a civil defence personnel, Encik Muhammad Amin bin Abd Rahman (PW2), who had happened to be passing by just after the accident had happened. Second was the fact that the trunk of the tree was in poor condition. At trial, Mohammad Nashriq bin Zainal (PW4), the civil defence personnel who had cleared the fallen tree with a chainsaw, testified that the bole of the tree in question was old, brittle, dry and rotten. Although he was not a qualified arborist, he was able to draw on his experience in this regard. PW4 also corroborated PW2's testimony that the tree was tall and lush.

[24] There was nothing in the record of appeal that would cause me to overturn this finding of fact. I was satisfied that, had proper monitoring and maintenance of the tree been undertaken by JKR, the plaintiff would not have suffered his injuries. JKR had not led any evidence to the effect that the precarious position of the tree could not have been uncovered even if they had undertaken the proper inspection.

The Liability Of Selia Selenggara

[25] The sixth and seventh defendants are referred to here collectively as "Selia Selenggara'".

[26] At the material time, Selia Selenggara had been awarded by the Government of Malaysia a concession to undertake maintenance of Federal roads in the southern region of the Peninsula. The terms of the concession agreement specifically excluded landscaping works from the scope of routine maintenance works to be undertaken by Selia Selenggara[4].

[27] This concession agreement took effect from 5 April 2018. Selia Selenggara had previously entered into a similar arrangement with the Government of Malaysia under a privatisation agreement. The previous arrangement required Selia Selenggara to undertake landscaping works, which included the pruning of trees[5].

[28] It was thus clear that, at the time of the accident, Selia Selanggara was not charged with the responsibility to undertake routine maintenance works relating to the monitoring of the condition of wayside trees and the pruning of such trees.

[29] I was thus of the view that the sixth and seventh defendants' appeal against liability must be allowed, on the basis that the duty to monitor and maintain the wayside trees on Federal roads in a manner so that they do not pose a danger to road users had not been delegated by JKR or the Government of Malaysia to Selia Selenggara.

[30] What was the basis of the trial judge's finding of liability on the part of Selia Selenggara? Paragraphs 35 and 36 of the grounds of judgment of the court below provide the answer:

> Tanggungjawab defendan ketiga hingga ketujuh.
>
> [35] Keterangan SD2 (Saksi Defendan Ketiga, Keempat dan Kelima) menunjukkan bahawa kawasan tempat kejadian adalah diselenggara oleh Majlis Bandaraya Seremban iaitu Defendan Pertama dan Kedua tetapi ini adalah bercanggah dengan Penyataan Pembelaan Defendan Ketiga, Keempat dan Kelima yang menyatakan tempat kejadian diselenggara oleh Defendan Keenam dan Ketujuh (Enclosure 75).
>
> [36] Oleh itu, Defendan Ketiga, Keempat dan Kelima adalah diikat oleh plidingnya sendiri yang mengakui Defendan Keenam dan Ketujuh adalah bertanggungjawab bagi penyelenggaraan di tempat kejadian. Jadi Defendan Ketiga, Keempat, Kelima, Keenam dan Ketujuh adalah bertanggungan 100% untuk tuntutan Plaintif.

[31] From the passage above, it appears that the trial judge formed the view that the statement of defence of the third to fifth defendants (JKR and the Government of Malaysia) bound Selia Selenggara, the sixth and seventh defendants. This was a fundamental error by the judge, as the sixth and seventh defendants did not put up a common defence with the third to fifth defendants.

The Appeal On Quantum

[32] The third to fifth defendants mounted an appeal against the quantum of damages awarded.

General Damages

[33] Of the awards granted by the Sessions Court in respect of the 11 injuries suffered by the plaintiff, learned Senior Federal Counsel found it fit to appeal on ten of them. They are summarised in the table below.

Injury suffered	Sum claimed by plaintiff	Sum awarded by the Sessions Court	Appeal by JKR	Range suggested by the Revised Compendium
(a) Closed comminuted midshaft right humerus fracture	RM19,750	RM15,000	RM12,000	RM12,000 to RM27,500
(b) Closed midshaft left humerus fracture	RM19,750	RM15,000	RM12,000	RM12,000 to RM27,500
(c) Closed left radius fracture	RM21,000	RM15,000	RM12,000	RM12,000 to RM30,000
(d) Closed fracture of left angle of mandible	RM22,250	RM16,000	RM14,500	RM14,500 to RM30,000
(e) Traumatic chest injury with right 2nd, 3rd and 4th rib fracture with pneumothorax	RM15,000	RM15,000	RM12,000	RM12,000 to RM15,000 (RM4,000 per rib)
(f) Closed right scapula fracture	RM16,750	RM16,750	RM15,000	RM12,000 to RM21,500
(g) Fracture of the right mandibular condyle	RM30,000	RM15,000	RM14,500	RM14,500 to RM30,000
(h) Fracture of four teeth	RM11,000	RM10,000	RM3,000	RM3,000 to RM12,000
(i) Loss of tooth	RM3,250	RM3,000	NA	RM3,000 to RM3,500
(j) Scars on shoulder and arm	RM18,000	RM15,000	RM5,000	RM12,000 to RM24,000
(k) Transverse process T1 to T4 fracture	RM128,000	RM32,000	RM22,000	RM22,000 to RM42,000

[34] It can be seen that all the awards granted by the trial judge were well within the range suggested by the Revised Compendium of Personal Injury Awards published by the Malaysian Bar.

[35] In the submissions of learned Senior Federal Counsel, it was not explained how each of the individual awards where manifestly excessive or unreasonable in the circumstances.

[36] It is apposite at this stage to remind ourselves of the principles to be applied in an appeal on the quantum of damages awarded for personal injury claims, mindful that determinations on quantum are findings of fact. In the case of *Jamiah Holam v. Koon Yin* [1982] 1 LNS 89; [1983] 1 MLJ 103, Hashim Yeop A Sani J held as follows:

> As regards the appeal on quantum it is an established approach for a court exercising appellate jurisdiction to adopt that in an appeal on quantum unless it can be shown to the satisfaction of the Appellate Court that the award is extremely inconsistent with the discernible trend or that the award was made on some misapprehension of facts or on some erroneous assumption of law or fact, the Appellate Court should not interfere. Here there was no evidence to show that the magistrate went beyond the limits of decided authorities in awarding general damages.

[37] In the present case, not only was there no evidence to suggest that any of the awards of damages were excessive, there was not even any credible submissions advanced as to why this was the case. All there was, as can be seen from the table set out in para. 33 *ante*, was the reproduction of the lowest figure in the range suggested in the Compendium in eight out of the ten awards being challenged.

[38] I am accordingly of the view that the appeal against the quantum of general damages ought to be dismissed.

[39] It is undeniable that parties have a right to appeal against the determination of the court of first instance. However, parties would be well advised not to mount appeals in plainly and obviously unmeritorious cases, particularly where the appeal relates to findings of fact. It is never the case that the more numerous the grounds of appeal, the more likely that the court sitting in appeal will find favour with one of those grounds, without a convincing (or even reasonable) argument being advanced in support of the grounds of appeal. Spray and pray never pays.

Special Damages

[40] It was advanced for the third to fifth defendants that the claims for special damages ought to be dismissed on account of the fact that no proof was adduced at trial to establish the sums claimed.

[41] The learned trial judge awarded the following as special damages: A

(i) costs of the police report and sketch plan: RM8;

(ii) cost of JPJ report: RM10; and

(iii) cost of police photographs: RM75.

B

[42] It was argued by Senior Federal Counsel that these claims ought to have been refused by the learned Sessions Judge because none of them were supported by receipts.

[43] It was not in dispute that copies of the police and JPJ reports and of the sketch plan were exhibited at trial. So were the police photographs. C Furthermore, the plaintiff was not challenged in cross-examination by Senior Federal Counsel that these costs had not been incurred.

[44] In my considered view, it was entirely reasonable for the court below to have concluded that these costs had been properly incurred given that the relevant documents had been adduced for the purposes of trial. D

[45] It was further advanced by Senior Federal Counsel that certain costs of future treatment and claims for pain and suffering for future surgery ought to have been refused, on account of the purported failure by the plaintiff to produce receipts for these items of claim.

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[46] I found these submissions perplexing. Of course, there were no receipts for the costs of future surgeries, because these costs have not yet been incurred. Nonetheless, there was evidence led by the relevant physicians regarding what these future costs might be. For instance, the attending maxillofacial surgeon, Professor Dr Ngeow Wei Cheong from the University F of Malaya Special Centre, provided a report[6] in which he estimated the costs of the future dental-related surgeries to be RM66,700. The learned judge only awarded one-third of this amount (RM22,233) on the basis that these were the costs of private care.

[47] The learned judge also awarded RM5,000 for future pain and suffering G arising from each of future orthopaedic surgeries and future maxillofacial surgeries. As these were awards for pain and suffering, it stood to reason that there would be no receipts issued in respect of them. To suggest otherwise was quite contrary to logic.

Conclusion H

[48] For the reasons explained in this judgment:

(i) the sixth and seventh defendants' appeal against liability in Appeal No. NA-12B-9-04-2022 is allowed with costs of RM20,000 here and below payable by the third to fifth defendants; and I

A (ii) the third to fifth defendants' appeal in Appeal No. NA-12B-10-04-2022 on both liability and quantum is dismissed with costs of RM15,000 payable to each of:

(a) the plaintiff;

B (b) the first and second defendants; and

(c) the sixth and seventh defendants.

Endnote:

1. See ROA/800, 804 in encl. 7 of Appeal No. 9.

C 2. See ROA/768, in encl. 6 of Appeal No. 9.

3. See ROA/752 to 754, in encl. 6 of Appeal No. 9.

4. See ROA/1035 at encl. 7 of Appeal No. 9.

D 5. See ROA/879 at encl. 7 of Appeal No. 9.

6. See ROA/529 (encl. 6) in Appeal No. 9.

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